

Historical Study E

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HISTORICAL STUDY OF

Federal Communications Commission
Office of the Secretary

**Market Entry Barriers, Discrimination and
Changes in Broadcast and Wireless Licensing**

1950 TO PRESENT

***Prepared for
The Office of General Counsel
Federal Communications Commission
by
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I. EXECUTIVE SUMMARY

A. Overview

As part of the Federal Communications Commission's mandate to identify and eliminate market entry barriers for small businesses under Section 257 of the Telecommunications Act of 1996 (hereafter referred to as "1996 Act"), and its mandate to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities under Section 309(j) of the Communications Act of 1934, the Commission commissioned Ivy Planning Group, LLC¹ to conduct this historical study of barriers to entry into broadcast and wireless licensing experienced by small, minority- and women-owned businesses from 1950 to the present. This study is the first FCC-sponsored historical, anecdotal, qualitative review of the subject.

Other statistical or quantitative studies have focused on this subject matter and have often revealed similar findings.² However, this study offers different insights - the stories - of African-Americans, Hispanics, Native Americans, Asian Americans, and Caucasians who have encountered market entry barriers. It is important to hear from real people about their experiences in order to create context and meaning for the data that is provided from other sources.

This study was designed to put a face on and give a voice to the process of obtaining a broadcast or wireless license. By creating a venue for these voices, the study allows people to say what their experiences were. Each participant provided his or her story independently. Some stories were fragmented and less coherent, while others were articulated clearly and concisely. While the stories vary by year, length, race, gender, circumstance, and narrator, their respective voices provide distinctive yet recurring themes on identifiable market entry barriers. In every case, the stories provide qualitative clarity and specificity to understand the process of obtaining a broadcast or wireless license from 1950 to the present.

Ivy conducted individual telephone interviews with 120 key persons representing small, minority- and women-owned businesses that attempted (successfully or not) to acquire, sell or transfer a license during the years 1950 – present, and 30 telephone interviews with key market participants (e.g., media brokers, lenders, attorneys, industry leaders, and/or FCC officials). The findings indicate that there are unique and significant barriers to entry for small, minority- and women-owned businesses.

¹ The Commission contracted with the Ivy Planning Group, LLC to do this study pursuant to Purchase Order No. PUR00000292, Requisition No. AUC00000135, under the GSA MOBIS schedule GS-23F-9805H.

² See, e.g. *Civil Rights Forum on Communications Policy, When Being No. 1 Is Not Enough* (1999); and R. Suarez and R. Cull, *Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries* (1995).

B. Summary of Key Findings

Regardless of the tone and tenor of the many voices of this study, a troubling story line resonates among the interview stories that span a half-century. Women and minorities faced pervasive discrimination, as well as small business market entry barriers, particularly in the fifties and sixties. The FCC attempted to ameliorate that discrimination in the seventies, eighties and early nineties through the tax certificate, distress sales, comparative merit, and lottery preferences.

Minorities and women made modest gains in broadcast ownership during this period, amidst persistent capital market discrimination and other small business market entry barriers. However, those gains were essentially reversed, in 1995, by both Congress's elimination of the tax certificate program and the Supreme Court's decision in Adarand, which made it significantly more difficult for race-specific rules and policies to be implemented by the FCC. The deregulation and the lifting of the ownership caps under the Telecommunications Act of 1996 made these barriers nearly insurmountable for small, minority- and women-owned businesses attempting to thrive or even enter the broadcast industry.

The FCC's and Congress' actions or inaction on particular regulatory or market issues have exacerbated those barriers. These actions and inaction include: the uneven enforcement of EEO policy; under utilized distress sales/license renewals; repeal of the tax certificate program; permitting use by non-minority men of minority and female "fronts" during the comparative hearing process; the lifting of the ownership caps; and minimal small business advocacy before the FCC.

Today small firms face barriers erected by deregulation and consolidation in both wireless and broadcast. Minorities and women confront those same barriers; and yet those obstacles stand high atop a persistent legacy of discrimination in the capital markets, industry, advertising, and community--and prior FCC policies, which worsened the effects of discrimination.

Based on those interviews, the findings revealed several factors that impeded and/or precluded small, minority-and women-owned businesses from entering, successfully competing and surviving in the broadcast and wireless industries including:

- Discrimination in the capital markets causing limited access to debt and equity capital that would be adequate and affordable for minority-and women-owned businesses;
 - Discrimination from the advertising industry against minority-owned and -formatted stations; exclusion of minority and women-owned businesses from the powerful network of information, deals and deal makers;
 - Market deregulation and consolidation caused by the 1996 Act;
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- Lack of industry experience for women and minorities due to few employment opportunities offered by majority broadcasters and the failure of the FCC to enforce EEO rules;
- Fractured or a lack of advocacy of small, minority- and women-owned communications businesses before the FCC, the courts and Congress;
- Misuse of minority and gender ownership programs by non-minority firms to the disadvantage of female and minority ownership;
- Congressional laws, court rulings, and FCC rules, regulations and policies, which have operated to the detriment of small, minority- and women-owned businesses.

C. Key Conclusions

Based on the shared experiences and perspectives of the study participants, Ivy has formed nine key conclusions concerning past, present and prospective market entry barriers:

- (1) Access to the capital markets is critical to the success of small, minority- and women-owned businesses;
 - (2) There is an absence of a necessary critical mass of small, minority- and women-owned businesses in broadcast and wireless ownership;
 - (3) Congress and the FCC erected and heightened market entry barriers inhibiting the establishment, growth and development of small, minority- and women-owned businesses;
 - (4) Discrimination played an important role as an entry barrier, especially with respect to minority participation in broadcasting;
 - (5) Bidding credits designed to increase the opportunities for participation in wireless auctions by small, minority- and women-owned businesses were ineffective and unsuccessful;
 - (6) The relaxation of ownership caps has significantly decreased the number of small, women- and minority-owned businesses in this industry;
 - (7) The declining participation of small, women- and minority-owned businesses in this industry has resulted in diminished community service and diversity of viewpoints;
 - (8) The declining participation of small, women- and minority-owned businesses in this industry has also resulted in a loss of civic participation, democratic values and freedom of speech; and,
 - (9) The FCC often failed in its role of public trustee of the broadcast and wireless spectrum by not properly taking into account the effect of its programs on small, minority- and women-owned businesses.
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A single question may be heard amidst the many stories, recommendations, commendations, complaints, and perspectives offered: whose spectrum is it anyway? In answering the question, the interviewees consistently responded that spectrum is a public good to be managed by the FCC in the public interest. While interview subjects believe that maximizing auction revenue for the public purse is important, it is equally in the public interest to promote ownership diversity, preserve viewpoint diversity, and eliminate market entry barriers.

II. INTRODUCTION

A. Purpose, Statutory Authority and Legal Basis

The purpose of this study is to provide a historical perspective on what market entry barriers, if any, small, minority- and women-owned businesses have faced in the acquisition, sale or transfer of FCC broadcast and wireless licenses. The study was designed to assist the FCC in implementing Section 257 of the Telecommunications Act of 1996, 47 U.S.C. §257³, which mandates that the FCC identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, which requires the FCC to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities.⁴

In addition, this study will assist the Commission in determining whether there is any evidence of discrimination that may establish a compelling governmental interest under Adarand v. Peña, 515 U.S. 200 (1995).

In Adarand the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision-making must serve a compelling governmental interest such as remedying past discrimination, and must be narrowly tailored to serve that interest. In order to demonstrate such an interest, the government cannot rely on general societal discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989). Instead, the government must establish that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a “passive participant.” Croson, 488 U.S. at 504.⁵

Furthermore, the study was designed, inter alia, to assist the Commission in determining whether the FCC is or has been a passive participant to discrimination in the private market. Accordingly, the study will help determine whether there is the factual predicate and legal premise to adopt programs encouraging women and minority ownership of FCC licenses. Moreover, the study will enable the Commission to gather anecdotal evidence of discrimination, if any, faced by small, minority- or women-owned communications businesses.

Section 257(a) of the 1996 Act, requires the Commission to complete a proceeding for the purpose of identifying and eliminating market entry barriers for entrepreneurs and other small businesses in telecommunications and information services. To meet this mandate, the Commission initiated an omnibus Section 257 proceeding by adopting a notice of inquiry to identify and eliminate barriers for small businesses. *See Market Entry Barriers Notice of Inquiry*,

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Section 257.

⁴ In addition, the Commission has full authority and power to conduct an inquiry for “any question [that] arise under any of the provisions of [the] Act” pursuant to Section 403 of the Act.

⁵ We note that gender-based classifications need only satisfy intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

11 FCC Rcd 6280 (1996)(NOI).⁶ In this *NOI*, the Commission requested comments on, among other things, whether minority- and women-owned businesses encounter “unique” obstacles in the telecommunications market, and determined that discrimination could be a market entry barrier.⁷ Following the *NOI*, the Commission released a *Section 257 Report* regarding the agency’s implementation of Section 257,⁸ wherein the Commission identified several obstacles that small businesses encounter, including access to capital, access to Commission decision makers, access to information, and Commission procedure.⁹ The report also addressed the Commission’s commitment to identify and remove market barriers experienced by women or minorities, but determined that the agency would have to fully evaluate the record to ensure compliance with constitutional requirements before the agency could take any action. The FCC, then, commenced a comprehensive examination, a series of market entry barrier studies, to further examine the participation of small businesses, including those owned by women and minorities in the provision of telecommunications services and the impact of the Commission’s policies on access to the telecommunications industry.

In rare cases, anecdotal evidence alone may be sufficient to constitute a compelling governmental interest. See *Wessmann v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998)(“anecdotal evidence alone can establish institutional discrimination that could serve as basis for race-conscious action...only in the most exceptional circumstances.”); *Engineering Contractors Association*, 122 F.3d 895, 925 (11th Cir. 1997)(anecdotal evidence standing alone in rare cases will suffice); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991). In any event, the Supreme Court has recognized that anecdotal evidence of discrimination is important because it can “bring the cold numbers convincingly to life.” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

Accordingly, this qualitative, anecdotal study is part of the Commission’s comprehensive examination regarding market entry barriers and was commenced in conjunction with several statistical studies¹⁰ and is designed to complement, illuminate and reinforce the findings of those quantitative studies.

⁶ In addition, The Commission’s Office of Communications Business Opportunities (OCBO) and its Office of General Counsel (OGC) held a *Market Entry Barriers Forum* to further explore impediments that small businesses experience.⁶ See *FCC Public Notice, Forum on Small Business Market Entry Barriers*, No. 64975 (Sept. 5, 1996) (Market Entry Barriers Forum)(hearing was held on September 24, 1996).

⁷ *Id.* at 6283.

⁸ *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report, 12 FCC Rcd 16802 (1997).

⁹ *Id.* at 16824-34.

¹⁰ These studies examine: (i) whether there is a link between minority broadcast ownership and news and public affairs programming; (ii) the utilization ratios and probabilities of success in wireless auctions for minorities, women, and non-minorities; and the impact, if any, of capital market discrimination on Broadcast and wireless spectrum business opportunities for minorities

B. Historical Snapshot

The Communications Act of 1934 created the Federal Communications Commission and provided the means and purpose of allocating frequency along the radio spectrum. While the mission of the Agency has generally remained the same, the FCC has used several different means of spectrum allocation.

From 1950 until 1993 the FCC awarded licenses to mutually exclusive competing broadcast applications through comparative hearings. If only one applicant applied, “a singleton”, the FCC awarded the license to that applicant without a hearing, provided the applicant met minimum requirements. The FCC began distributing wireless licenses by lotteries in 1982. Since 1993, the FCC allocates wireless licenses, for commercial use, solely by means of auction. Starting in 1999, broadcast licenses have also been awarded solely through auctions.

In addition to being awarded a license directly by the FCC, an active secondary market for licenses exists wherein they are bought and sold independent of the FCC. Except for requiring FCC approval, the Commission is not generally involved in these transactions.

At varying times and through varying means (see Statutory, Regulatory and Historical Timeline at Appendix A), ownership programs have been made available to small, minority- and women-owned businesses to provide increased opportunities for them to participate in both broadcast and wireless license ownership. For licenses obtained from the FCC, various ownership programs have enhanced the comparative hearing, lottery and auction processes. In the secondary market, tax certificates and distress sales have been implemented as opportunity-creating mechanisms for small, minority and women licensees.

For essentially the first half of the 20th century, the broadcast industry was dominated by White males. Most stations were owned by large corporations such as CBS and NBC and had been awarded by the government at no cost to the licensee. The advantages and opportunities created by the initial award process provide the foundation for today’s telecommunication industry.

There was virtually nothing like today’s ethnic programming on the air. As late as 1943, radio still upheld its longstanding policy that African-Americans, in contrast to Whites, would not be referred to as Mr., Mrs., or Miss on any commercial network show. Furthermore, African-Americans were portrayed on the air as servants or as comical or ignorant characters.

and women; (iii) the estimation of utilization ratios and probabilities of obtaining broadcast licenses from the FCC through the comparative hearing process; and (iv) the impact of advertising practices on minority-owned and minority-formatted broadcast stations.

Against this backdrop, the following list of “firsts” is offered.

- In 1922, Marie Zimmerman became the first White woman to own a radio license.¹¹
- “In 1947, station WDIA-AM in Memphis, Tennessee, became the first radio station to devote all its air time to Black programs.”¹²
- It was not until 1949, when Jesse B. Blayton purchased WERD in the secondary market in Atlanta, that the industry had its first Black radio station owner.¹³
- In 1960, Andrew Langston, a Black man, started his more than 13-year process of acquiring a radio broadcast license from the FCC through a comparative hearing. It was the first time that an African-American had filed an application with the FCC. Mr. Langston was finally awarded his license in 1974.
- In 1973, the FCC issued a construction permit to WGPR-TV (UHF) in Detroit, the first Black owned television station.¹⁴
- The first Hispanic station opened in the middle 1950s. The record of ownership is uncertain; the station operated in the southwestern section of the United States, in either Texas or New Mexico.
- In 1989, after four years in a comparative hearing, Dorothy Brunson became the first African-American woman to own a television station.

¹¹ Halper, Donna. Marie Zimmerman – Broadcasting’s First Female Owner.
<<http://www.olderadio.com/archives/people/zimmerman.html>>.

¹² Alston, Roland (1978, July). Black-Owned Radio: Talking to the Airwaves in a Hurry. *Black Enterprise*, p. 22.

¹³ Id., p.23.

¹⁴ Molden, Vaughncille. Telecommunications and Black Americans: A survey of Ownership, Participation and Control. Washington University: St. Louis, Missouri. August 1975, p. 128. Master of Arts Thesis.
